rs
ly
in

## INDEX TO BRIEF


PAGE

MOTION BY LORTON BLAIR ET AL. FOR LEAVE TO FILE BRIEF AS AMICI CURIAE:

Motion ..... 1

BRIEF FOR AMICI CURIAE:

Statement of Interest ..... 4

Argument:

I. a. The Nearby Differential cannot be sustained as a "market differential"; it is not one of the four permitted adjustments to uniformity ..... 6

b. In interpreting a statute we must presume a constitutional result ..... 14

c. The Nearby Differential is an illegal market barrier ..... 16

II. No further hearings are justified ..... 19

Conclusion ..... 21


## CITATIONS


CASES:

Blair v. Freeman, 370 F. 2d 229 (1966) ....2, 4, 5, 9, 11, 12, 13, 19, 20

Cranston v. Freeman, 290 F. Supp. 785 (1968) 5, 10, 14, 15, 16, 19, 20, 21

N. Y. Guernsey Breeders Co-Op v. Wickard, 141 F. 2d 802 (1944) ..... 16

Secretary of Agriculture v. Central Roig Refining Co., 338 U.S. 604, 616-618 (1950) .....15, 16

AUTHORITY:

New York-New Jersey Milk Marketing Order (7 CFR 1002) et seq. ..... 1, 4, 6, 7, 10, 13, 14

STATUTE:

Agricultural Marketing Agreement Act, 7 USCA, Sec. 601 et seq. ..... 7, 10, 11, 12, 14, 18

TEXT:

The Pricing of Milk Under Federal Marketing Orders, by Neil Brooks, Assistant General Counsel, U. S. Dept. of Agriculture, in 26 Geo. Washington Law Review, 180 (1958) ..... 8

IN THE SUPREME COURT
OF THE UNITED STATES

---

**October Term, 1969**
**No. 25 and No. 52**

---

Frederick T. Zuber et al.,
*Petitioners*

vs.

Russell Allen et al.,
*Respondents*

---

Clifford M. Hardin, Secretary of Agriculture,
*Petitioner*

vs.

Russell Allen et al.,
*Respondents*

---

## MOTION BY LORTON BLAIR ET AL. FOR LEAVE TO FILE BRIEF AS AMICI CURIAE

---

Lorton Blair, Orton Mattocks, Lawrence Roloson, Gordon W. Albrecht, Milford L. Kinsman and Bruce McClelland by their attorney, C. Wayne Smyth, move the Court for leave to file Brief as Amici Curiae in the above matter and in support thereof allege as follows:

*Motion for Leave To File Brief*

1. The moving parties were the Plaintiffs, Appellants and ultimately the successful litigants in the case of *Blair vs. Freeman* in the United States Court of Appeals for the District of Columbia Circuit, 370 F. 2d 229.

2. The question presented in the case at bar was ruled below on the authority of *Blair vs. Freeman* (supra) and the legality of nearby Differentials is, therefore, for the first time, squarely before the highest court.

3. The moving parties for reasons set forth in *Blair vs. Freeman* (supra), are substantially interested in supporting the conclusion reached below in the case at bar since any upholding of Nearby Differentials would probably result in a new promulgation of them by the Secretary of Agriculture who removed them from the present New York-New Jersey Milk Marketing Order (7 CFR 1002) only after the result became final in *Blair vs. Freeman* (supra).

4. The moving parties have requested the consent of the Parties to this litigation to the filing of said Brief as Amici Curiae, the original letters of consent of Lawrence D. Hollman, Esq. and Erwin N. Griswold, Esq., Solicitor General of the United States, are attached hereto. Charles P. Ryan, Esq., for himself and Edward J. Ryan, Esq., and John H. Simard, Esq., representing Russell Allen et al., have refused consent by letter dated July 7, 1969 in response to certified mail request to them dated June 16, 1969 deposited in the United States Post Office at Troy, Pennsylvania.

5. A reading of the Petition for Certiorari and Brief thereon, the Brief for Respondents and the Brief

of the Amici Curiae thereon discloses that there is a probability that the following arguments may be insufficiently presented:

a. That Congress did not and could not have intended to authorize Nearby Differentials of the kind in question here, the history argued about by the principal disputants ignoring salient facts which lead to this conclusion concerning Congressional intent;

b. That until some service or value can be established for nearby milk passing not to the handler but to the non-nearby producer there is no justification for reaching into the pocket of the non-nearby producer to pay to the Nearby producer what should be paid by the handler, *if at all;*

c. That the Nearby Differential is an illegal market barrier;

d. That there is no justification for further hearings.

Respectfully submitted,

C. Wayne Smyth,
*Counsel for Lorton Blair et al., Proposed Amici Curiae.*

## BRIEF FOR AMICI CURIAE

---

## STATEMENT OF INTEREST

---

Amici Curiae were the Plaintiffs, Appellants and successful litigants in the case of *Blair vs. Freeman*, 370 F. 2d 229 (1966). They are all individual dairymen farmers, none of whom qualified in *Blair* for the Nearby Differential under the New York-New Jersey Milk Marketing Order, 7 CFR 1002 et seq. as it then existed. The case at bar was ruled below on the authority of *Blair* and the legality of Nearby Differentials of the kind Amici Curiae regard as illegal, is now before the highest Court. Amici Curiae are substantially interested in supporting the conclusion reached below in the case at bar lest such Nearby Differentials again appear in the Marketing Order for their area.

## ARGUMENT

We advert only to the substantive question of the legality of Nearby Differentials as we later define them, and not in any manner to questions of procedure.

This Brief assumes that the principal contestants will have researched pertinent authority adequately and will have presented with emphasis not only their own arguments but also the sharply divergent viewpoints expressed by the Blair Court and the Cranston Court (U. S. Circuit Court of Appeals for the District of Columbia in *Blair vs. Freeman,* 370 F. 2d 229 (1966), and below in the case at bar, and the U. S. District Court for the Northern District of New York in *Cranston vs. Freeman,* 290 F. Supp. 785, appeal docketed, Nos. 32, 793-99 Cal., Oct. 28, 1968). The Blair Plaintiffs, amici curiae here, will have two purposes in this Brief: To clarify arguments which may have become so complicated by over-elaboration that their simple principles are in danger of being clouded, and to combat vigorously a suggestion persistently made by defenders of the Nearby Differential which would, if adopted, give them an unwarranted victory by attrition.

For these purposes we outline our Brief as follows:

**I. The Nearby Differential under any name violates the Agricultural Marketing Agreement Act on three counts:**

**a. It is not one of the four permitted adjustments to uniformity provided in the statute.**

**b. Its uniquely discriminatory operation against a particular class of producer makes it inherently illegal.**

**c. It is clearly a market barrier prohibited by Sec. 608c (5) G of the Act.**

**II. The persistent suggestion by defenders of the Nearby Differential that this Court does not have enough "testimony" for a proper decision coupled with requests that the case go back for further hearings not only assumes the conclusion that the differential can be sustained but also seeks to win by attenuating indirection what cannot be won directly.**

---

## I.

**a. The Nearby Differential cannot be sustained as a "market differential"; it is not one of the four permitted adjustments to uniformity.**

Since many discussions and references confuse legitimate nearby differentials for transportation and direct delivery, with the kind of Nearby Differential to which we object, a definition is required. An illegal Nearby Differential is one which in effect removes from the value of the milk pool before announcement of the uniform price an amount of money not charged to the handler, to provide a bonus over and above factors of transportation and direct delivery to be paid to nearby producers based solely on the presumed nearness of their farms to the market center, by means of lines drawn on a map. (Most often *all* producers have a nearby deduction removed from

their share of the pool but the nearby producers then receive back more than the deduction—thus receiving a bonus at the expense of the non-nearby producers. In the Connecticut order a class of "nearer-by" producers get back part of the deduction but not all of it, thus suffering a loss which is less than that suffered by the producers furthest from the market center.)

One significant fact has been overlooked in all of the cited History of Milk Marketing and the chaotic conditions which preceded Federal Milk Marketing Orders: That there were, in the days prior to the Agricultural Marketing Agreement Act, 7 USCA, Sec. 601 et seq. (hereinafter the Act), two distinct grades of milk being produced in significant quantities in the Northeastern United States.[1] One grade was produced under Board of Health regulations pursuant to farm inspection and was thereby eligible for sale for fluid (drinking milk) purposes. The other grade was uninspected and could only be marketed legally for cheese, butter, etc.—(manufacturing purposes). Since the inspected supply—more expensive to produce—was of higher quality and available for fluid use (indeed for any use), it could ordinarily command a higher price in the market place than the uninspected supply. The cutthroat competition for the higher priced market came about to a large extent from the fact that more and more uninspected producers improved their facilities, thus gaining Board of Health approval to market their milk for fluid purposes. Handlers simply would not pay more for milk for one particular use (fluid) than for another (manufacturing) if that milk was of the same quality and

[1] Cf. 28 F.R. 11956, Nov. 8, 1963.

availability. It was the old distinction between inspected and uninspected milk which led to the constant reference in milk marketing discussions to an extra value for fluid milk. Under Federal Order *all* milk is Health-inspected, fresh, top quality—fungible with all other Federal Order milk.[1] When supplies of it are greater than the needs of the fluid market it was, is and always will be, an inevitable economic fact *in an unregulated market* that prices for those supplies will fall to the level of the lowest common denominator—the level of manufacturing milk.[2]

---

[1] See "The pricing of Milk Under Federal Marketing Orders" by Neil Brooks, Assistant General Counsel, U. S. Department of Agriculture, in 26 *Geo. Washington Law Review* 180 (1958).

[2] Finding by the Secretary, Nov. 8, 1963, at 28 F.R. 11956:

"The reason for these depressed prices primarily was that an excess of milk above the quantity which could be used in whole fluid form was being produced and delivered to market. It was demonstrated that whenever any significant excess of milk was produced for the fluid market, prices would fall to the level of manufacturing milk prices. The major problem now, as it was when the order was first established, is to maintain orderly marketing for milk in this market in a situation, where in order to assure consumers of sufficient quantities of milk at all times, it is necessary that more milk be produced and delivered to market than can be used as fluid milk. *In the absence of regulation, the maintenance of a necessary reserve of milk above Class I requirements has a depressing effect upon the prices for all uses of milk, including producer returns* and an unstabilizing effect upon the marketing of milk in the area. The institution of a classified pricing plan and marketwide pooling through the Federal milk order is the means for achieving adequate and dependable supplies for consumers (which includes the necessary reserve) without the unstabilizing conditions and depressed prices to producers *which would otherwise result.*" (Emphasis ours.)

Under the Act, the classified pricing system whereby a higher price is affixed to that portion of milk which is sold for fluid use than for the remaining portion is part of a broad economic program devised by Congress to increase prices to farmers. The higher fluid use price does not relate to the milk which is involved since all of the milk is fungible. Nor does it relate to a producer or group of producers since the milk of one producer is indistinguishable from the milk of another. Thus the benefit of the fluid use price is not, even in part, the property of or the privilege of any producer but a result of *governmental regulation* as part of a broad economic program for all farmers. *As such it must be apportioned uniformly to all producers.*

The *Blair* Plaintiffs do not presume to be able to improve upon the *Blair* Court's exposition of how the Nearby Differential relies upon the fluid use of milk by handlers to arrive at a prohibited exception to uniformity. In the case at bar and the *Cranston* case, however, to obviate the force of that reasoning, supporters of the Nearby Differential have suggested that the Secretary in *Blair* simply put his reliance on the wrong adjustment to uniformity; that even though the Nearby Differential certainly does not meet the requirements of a Location Differential under adjustment (c) the Secretary in the case at bar put his justification on the right line by calling it, in effect, a "Market" Differential. There follows a long and complicated history of the legislative development of the Act together with discussion of the "record" of the years prior to enactment—a record which was the chief subject of the testimony in the *Cranston* case. At best the principal contestants come up with a welter of confus-

ing propositions and counter-propositions which prove nothing, especially since the point sought to be made is largely irrelevant.

If anything is clear about Congressional intent it is the purpose of Congress to end once and for all the cut-throat economic competition in an industry peculiarly subject to the worst competitive evils by the existence of "flush" and dry periods of production. Are we for one moment to ssume that, by the last minute inclusion of "broad" words, contrary to the whole carefully conceived plan to avoid the pitfalls of unconstitutional delegation of discretion,[1] Congress intended to authorize the Secretary to imbed into the regulatory scheme a means to perpetuate the evil effects of the very competition it sought to terminate? If there is anything clear about the years just prior to the Act it is the self-evident economic fact expressed by the Secretary that whenever any significant excess of milk was produced for the fluid market, prices would fall to the level of manufacturing milk prices.

Thus *all* producers stood, before enactment of the Agricultural Marketing Agreement Act, on the brink of economic disaster from marketing warfare. As more and more farms became Health-inspected, their milk fully qualifying for any use, thus swelling the total of available *fluid* supply milk (as distinguished from "manufacturing" milk, for cheese and butter, from uninspected farms), any producer, near or far, could find his higher-cost inspected milk going for manufacturing prices as the raiding forays of this warfare ebbed and flowed. No producer had more than a precarious and temporary ad-

[1] Cf. *Cranston vs. Freeman* (supra), at page 799.

vantage, and the advantages, often mentioned for nearby milk (its availability, its threat of direct competition with the handler as retail milk, etc.,—advantages for which the *handler* should pay if valuable to him) were (and are) not limited to the market center (Boston or New York or Hartford as the case might be). Thousands of producers supplying hundreds of towns in the non-nearby areas had local and temporary advantages[1] but *all* stood in peril. No one gave up any substantial economic position by coming under the protection of the Act. As the Court said in *Blair* at page 27, "For the general welfare of all it [Congress] decreed that some producers might have to forsake their peculiar advantages, by requiring that uniform prices be paid to all producers, subject only to a few narrow and well-defined adjustments." The benefit of fluid prices derives not from the milk itself—all milk under Federal Order is fungible—nor from the producer, but from Government regulation, smoothing out the hills and valleys of prices for a product of equal value uniformly to all producers. Congress could scarcely have intended otherwise.

Thus to contend that there was before the Act a "Market" differential which in the circumstances gave nearby producers a higher share of the fluid market is not only impossible history from the standpoint of economics, but also confuses the later statutory concept of "Fluid" prices and "Manufacturing" prices for fungible milk, with the pre-statutory fluid prices for inspected milk and manufacturing prices for uninspected milk, both

---

[1] Cf. Secretary's decision of Feb. 1, 1964, 29 F.R. 1646, at p. 1652-3.

of which tended, to the detriment of all producers, to sink to the lower level.

We submit that the "Market" differential is nothing more nor less than what the *Blair* Court termed it, compensation to a producer "for delivering his milk to a city market instead of to a country plant" (and, we add, as such payable by the handler, not by fellow producers).

We point out in passing that handlers before the Act *could not* customarily have applied any such differential as the one in the case at bar by removing it from the pocket of one producer and placing it in the pocket of another. The handler had no such power. If he paid more for nearby milk he paid the extra amount out of his own pocket, and the allocation between transportation, direct delivery, and any kind of bonus was never entirely clear. If, occasionally in the economic battles of the times, cooperatives used a pooling method with nearby producers receiving more than non-nearby producers, the amount inextricably commingling transportation and other factors, those cooperatives were acting not as handlers but as producers' representatives and anyone who objected to his share could deal elsewhere. In practical effect, modern Nearby Differentials allow no such freedom but have fastened the evil relict of the old economic warfare upon the hapless non-nearby producer indefinitely unless this Court voids them.

Just as whatever extra price might have been paid by handlers for nearby milk inextricably commingled elements of transportation, direct delivery, quality, and possible bonus for factors the handler may have considered of value to him, the proponents of the Nearby Differen-

tial have confused and continue to confuse legitimate and necessary Differentials for transportation, etc. with the illegitimate, unnecessary and indefensible Nearby Differential. The Nearby Differential, based solely on farm location, *is in essence a tariff assessed against one group of producers payable to another group of producers within the same market and constitutes a partial exemption from pooling.* Only after the money for the Nearby Differential payments has been subtracted from the pool is the remainder made a part of what is announced as the uniform price. The resulting announced uniform price cloaks the truth and is not uniform to all producers. All other Differentials, while varying prices to producers under the Order, actually contribute to the principle of uniformity rather than violating it. For example, varying butterfat tests are accounted for, according to the market value of the butterfat; transportation Differentials reflect actual hauling costs. But the Nearby Differential relates to nothing of a tangible nature and can only be accounted for by a disproportionate sharing of the Class I value of the pool. 24 F.R. 1049, 1063 (1959).

There is one other consideration which seems to have escaped the attention of the disputants. No matter what the Nearby Differential may be named it is in every case geographical and by that token a *location* differential. Since it does not, as shown by the *Blair* Court, measure up to the requirements of a Location Differential, and since by ordinary statutory construction what cannot be sustained under direct provision of Congress cannot be presumed to be authorized under the vague general wording of another provision, how can the Nearby Differential be permitted to stand? If the historical exploration

of *Cranston* and the appellants has uncovered anything of value at all, it is that Location Differentials were intended to cover transportation and nothing else. Does this not spell the complete doom of the Nearby Differential?

---

**b. In interpreting a statute we must presume a constitutional result.**

It is a truism that equal parties equally placed must have equal treatment under our laws. "Differentials" are simply differences based upon factors enabling the law to treat everyone equally. Manifestly, a farmer producing a better (more valuable) product must not receive a price equal to the price of those who produce a less valuable product; such equal treatment would not be equality at all. Thus Differentials are provided as equalizers to make sure that everyone gets *essentially* equal treatment. The Statutory scheme in the Agricultural Marketing Agreement Act is calculated to accomplish exactly that result. Federal Milk Marketing Orders establish a base price which applies to milk of a designated butterfat test which is delivered in a designated zone or area. Both the Massachusetts-Rhode Island Order and the New York-New Jersey Order establish the base price for milk of 3.5 percent butterfat which is delivered in the 201-210 mile zone. Milk testing either above or below the 3.5 standard is accounted for according to the market value of butterfat to both the individual producer and the purchasing handler. By the same token, milk delivered closer to or more distant than the 201-210 mile zone is adjusted to both the producer and the purchasing handler in accordance with actual transportation

costs. It is common ground that there may be other market variables in addition to these two which should be accounted for and they are covered in the Act under the terms Market, Volume and Production Adjustments. Although we believe that the pertinent Committee reports are reasonably specific as to what these permissive adjustments encompass, appellants choose to argue that they were meant to cover a broad range of variables. We submit that the precise meanings or latitude of these permissive adjustments are irrelevant to the basic question involved in this case. It is axiomatic that any adjustment must relate to a specific service which is performed or a tangible value which has been added or subtracted. It is clear that the basic question before this Court is not whether there is or ever has been any service or value supplied by Nearby producers but in the event there is or was, *to whom did the benefit accrue*? To interpret the Statute in a way permitting the Secretary of Agriculture to assess non-nearby producers for a service or value which accrues to the handler would result in an unconstitutional discrimination. Any real service or tangible value could properly be assessed to the handler benefited, within the framework of the Act, without reference to geography and the fact that it has not been so assessed demonstrates the illusory nature of the alleged value.

The *Cranston* Court, at p. 809, acknowledged that differentials *paid without reference to any rational basis* would be invalid, then cited *Secretary of Agriculture vs. Central Roig Refining Co.*, 338 U.S. 604, 616-618 (1950), that *customary payment* is alone a sufficient rationale for continued payment under a scheme of regulation. It is obvious that customary payment (even though, as we

have shown *this* custom could have no valid historicity and conflicts both with the basic intent of Congress and the specific provisions of the Act) is the only hope of defenders of the Nearby Differential. Is custom then so potent? *IF* there had been a custom would it authorize the Secretary unlimitedly to broaden its extent geographically and financially? Would it fasten its hold on the future indefinitely? If the alleged custom was itself evil, could it be recognized as a rationale? Racial discrimination was a custom in many parts of this country—could it support even to the slightest extent a valid administrative rule? The *Cranston* Court puts too much strain on the *Central Roig* case.

The only adjustment to uniformity not yet mentioned is (d), to reward even production. If this could conceivably be construed as a service to uneven producers it is still an individual matter impossible to reward on a geopraphical basis without patent discrimination.

The Guernsey case, *N. Y. Guernsey Breeders Co-Op vs. Wickard,* 141 F. 2d 802 (1944), cert. den. 323 U.S. 725, clearly shows that no one occupies a position of special privilege for values that cannot be established. Put simply the Secretary can no longer be permitted to continue reaching into the pockets of one group of producers to place money in the pockets of another group separated only by a line arbitrarily drawn on a map *and by no other viable difference.*

---

**c. The Nearby Differential is an illegal market barrier.**

There is nothing sacred about the names used to describe areas. The Non-Nearby area in any order is pat-

ently a "production area in the United States", within the meaning of the Statute. The Nearby Differential in its operation most certainly limits the marketing of milk in the nearby areas, both from the non-nearby production area of the particular Order in question and from other production areas. Economics alone would dictate such a result in border zones between Orders but the statement is not just theoretical in view of the extreme example of the Connecticut situation (7 CFR 1015). There, non-nearby farmers are penalized 43-45¢ per hundredweight in a generally deficit supply Order area thus effecting a failure to draw in the necessary milk in times of low production from surplus producing lower-priced Order areas such as the New York-New Jersey marketing Order area. As a result prices under the Connecticut Order remain artificially high while New York prices have for years been the lowest in the Northeast as shown by any examination of USDA Federal order statistics. All of this is done ostensibly to make available to the nearby farmers about 3¢ per hundredweight, but this minimal benefit per farmer for the large number of nearby farmers to the very great detriment of so few non-nearby farmers is obviously not the real reason for the Differential. Patently the real reason is to exclude as many farmers as possible from seeking a Connecticut Market so that the Connecticut fluid use and producer price will remain high. In this Order area the Nearby Differential is used not merely (and not greatly) to *enrich* nearby farmers at the expense of those further from the market center but *as a market barrier to effect the maintenance of high prices at the expense of neighboring Order areas.* Lehigh Valley Cooperative Farmers, Inc. v. U. S., 370 U.S. 76 (1962),

alone should serve to terminate this misuse of official authority. This Connecticut extreme example merely serves to highlight the inequity of Nearby Differentials when their operation is carried to absurdity.

The Nearby Differentials set up within the first few years after enactment of the Agricultural Marketing Agreement Act in the New York and Boston Orders bore lightly upon the non-nearby producers both in amounts and in territory designated as "nearby", calling for pool deductions around 2¢ and 3¢ per cwt. Meanwhile came the Connecticut Order where 93% of the milk and geographically most of the milkshed was designated as "Nearby", at an oppressive cost to the remaining non-nearby producers. Accompanying this increase of special privilege was a gerrymandering of territory and a blanketing of entire states within the nearby zones regardless of distance. (Some parts of New Jersey 150 miles from the Market Center were arbitrarily placed in the 1-50 mile zone by declaring all of New Jersey "nearby" under the now voided Nearby Differential in the New York-New Jersey Order.) If there ever had been a Nearby Differential comprehended within the meaning of a "Market differential customarily applied by the handler", since it would be hinged upon custom, how can the Secretary be permitted to expand it at his whim? If the Nearby Differential is some kind of reward for previous competitive position how can the reward become greater over the years when competition for fluid markets is supposed to have ceased?

An examination of the Secretary's Decisions in the promulgation of the Orders above mentioned disclosed *no new* History and no *economic geography* to inspire such

piracy, only the increasing demands of pressure groups for more privilege. With the trend toward mergers and larger and larger Order regions there will soon be a great temptation to declare large parts or all of the politically potent Northeast as a "nearby" zone for the effective exclusion of, for example, Wisconsin milk, unless this Court calls a halt to the whole program of creeping privilege. Once an illegality such as this gets a foothold it can corrupt the entire process of milk marketing. "Power tends to corrupt; absolute power corrupts absolutely." (Lord Acton, 1887)

---

## II.

**No further hearings are justified.**

Until the *Blair* suit was brought by six individual producers no distinctly "grassroots" producer suit had ever been filed in the field of milk marketing, and to this date only the *Blair* case and the case at bar have been pushed by and supported by individual farmers without organized support. The *Blair* plaintiffs filed their appellate Brief in the Circuit Court of Appeals for the District of Columbia in special form upon affidavit that none of them had an income in excess of $6000 net per year; since that time the return of their costs in *Blair* enables them now to print this Brief. The point is that it is economically difficult for small farmers to mount a legal offensive and it would be even more oppressive were they faced with the necessity of extensive hearings requested by supporters of the Nearby Differential. Where could small individual farmers find and how could they employ an array of economists and experts to prevent the sheer weight of irrelevant expertise brought

forward by the Government and large Cooperatives from overwhelming the judgment of the trial court as apparently happened in *Cranston?* The argument that no case so important as *Blair* and the case at bar should be decided on motion for summary judgment, because the ultimate decision should be made only after full development of the facts, presupposes that those facts will be of value to the Court. But with a full record in *Cranston* there is still no aid for the Court in deciding the basic question to which the *Cranston* testimony and record are entirely irrelevant. The only valuable facts are the Statute, the Regulations, the Secretary's discussions—and descriptions of the operation of Milk Marketing—on which there is no dispute. As we have shown, testimony of prices paid to particular producers prior to the Act, and evidence trying to establish the Nearby Differential as a "Market Differential" customarily applied by handlers prior to the Act, not only attempts to undercut the very purpose of the Act itself and contains much impossible history but also is irrelevant until such time as the proponents of the Nearby Differential can come up with some value or service attaching to nearby milk *to justify payment by the non-nearby producer instead of the handler*—an impossible task. By emphasis on lengthy hearings and testimony those who wish to uphold the Nearby Differential hope to confuse the real issue and smother the small farmer in a morass of tedious irrelevancies. Their whole foundation for requesting further hearings rests on the false assumption that the Nearby Differential *can* be justified; their battle is largely won if the Court grants their request for further hearings, for they would then clinch the victory by attenuation.

## CONCLUSION

The decision of the Circuit Court of Appeals for the District of Columbia should be affirmed and *Cranston vs. Freeman,* 290 F. Supp. 785, expressly disapproved.

Respectfully submitted,

C. WAYNE SMYTH,
*Counsel for Lorton Blair et al.,*
*Proposed Amici Curiae.*